Supreme Court, U.S.
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NO. 94-2

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MITSUBISHI INTERNATIONAL CORPORATION,

Petitioner,

v.

CARDINAL TEXTILE SALES, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred when it concluded, under the facts and circumstances of this case, that the constructive trust law of Georgia, Rule 64 of the Federal Rules of Civil Procedure, and the All Writs Act did not provide a basis for the district court to place in receivership all of the Respondents' assets to secure a possible future money judgment.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents General Sales & Leasing Company, Classic Sales, and Robert E. Lee ("Respondents") respectfully submit their Brief in Opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

[1] Pursuant to Supreme Court Rule 29.1, Respondents submit that they do not have any parent corporations or subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 14 F.3d 1507, and is reprinted at pages 1a-38a of the appendix to the petition. The relevant orders of the district court are unreported. The district court's orders are reprinted at pages 39a-89a of the petition, and at pages 1a-10a of this brief in opposition.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 9, 1994. The petition for a writ of certiorari was filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 64

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other

corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Federal Rule of Civil Procedure 65

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

* * * *

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT

This case arises out of a private, contractual dispute in connection with the purchase and sale of textile yarn. Petitioner's claims include breach of contract, conversion, common law fraud, civil RICO, and other claims for money damages in connection with the underlying commercial transactions. Pet. App. 7a. Soon after the action was filed, the district court, at Petitioner's request, put all of the Respondents' assets into involuntary receivership. Pet. App. 4a.

The present interlocutory appeal arises out of several orders of the district court allowing payment of fees to Respondents' attorneys out of assets which the court had placed under the receiver's custody. Pet. App. 11a. At the outset, the court of appeals acknowledged the correctness of the Respondents' jurisdictional challenge to Petitioner's invocation of the "collateral order doctrine" but nevertheless found jurisdiction to hear the appeal by treating the district court's orders as equivalent to denials of a request for preliminary injunction. Pet. App. 16a. Thus, accepting

jurisdiction, the court of appeals affirmed the district court's orders allowing the payment of Respondents' attorneys' fees. Pet. App. 4a. The court of appeals reached this result after concluding the district court had no authority under Georgia law to impose a constructive trust or otherwise to attach the Respondents' assets. Pet. App. 4a.

In seeking further review by this Court, the issue raised by the Petitioner in the court below has undergone a remarkable transformation, bearing no resemblance to the question now presented by the Petitioner. In its decision, the court of appeals addressed the following issue: "whether the district court erred when it awarded attorneys' fees to counsel for the [Respondents] and exempted such fees from the provisions of the temporary restraining order as well as the operation of any constructive trust that might be impressed on final judgment." Pet. App. 12a. By contrast, the question now presented by Petitioner is "[w]hether federal district courts have the authority under Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651, to issue preliminary injunctions freezing defendants' assets in order to protect a future money judgment." Pet. (i). The question now presented by the Petitioner has been fashioned from an issue meriting only footnote treatment in the court below. Pet. App. 27a-28a.

Petitioner commenced this suit in the United States District Court for the Northern District of Georgia on July 3, 1991. On that same date, the district court issued a temporary restraining order enjoining the Respondents "from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any and all monies received, directly or indirectly" from Petitioner. Pet. App. 87a-89a. On August 22, 1991, the court granted the Petitioner additional equitable relief by appointing a receiver to take control of *all* of the Respondents' assets. Pet. App.

80a-86a. The appointment of a receiver was premised upon the court's conclusion that the Petitioner had demonstrated a substantial likelihood of prevailing on its claim of constructive trust. Pet. App. 80a. It had not been established, however, that all of the assets of the Respondents which were in the custody of the receiver could be traced to monies obtained from the Petitioner. Pet. App. 11a.

The receivership order granted the receiver plenary power over all of the Respondents' assets, not just those involving assets traceable to Petitioner's funds; indeed, the receiver was given "full and complete authority to take all actions necessary or advisable to investigate, operate, and manage the businesses of the [Respondents] and to efficiently locate, protect, and preserve all assets in the possession or control of the [Respondents]." Pet. App. 81a.

The receivership order utterly divested the Respondents of any participation in, or control over, their own business or financial affairs.[3] For sustenance, the order included a provision for the payment of a meager living allowance for Respondent Lee and his family. Pet. App. 84a-85a. Thus, while the Petitioner's claims for unliquidated damages have remained unadjudicated for more than three years, the Respondents' assets have remained beyond their use and control.

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[3] For example, the order directed that "no person holding or claiming a position as an officer, director, employee, agent, or shareholder of any of the [Respondents] shall possess any authority to exercise any rights or powers of such position or to act in any regard to any of the existing business affairs of the [Respondents]." Pet. App. 83a.

Also in the receivership order was a provision for the payment of Respondents' court-approved, reasonable attorneys' fees and expenses, which were to be paid out of the millions of dollars of Respondents' assets placed in the exclusive control of the receiver, and which were to be unrestricted after payment. Pet. App. 84a-85a.[4] On August 28, 1991, Petitioner noticed an appeal to the court of appeals from the provisions of the receivership order regarding attorneys' fees. Res. App. 9a-10a. The court of appeals affirmed the district court's orders. Pet. App. 4a. In affirming, however, the court of appeals also held that the district court's ruling on the issue appealed was correct because the district court had no authority under Georgia constructive trust law or Rule 64 of the Federal Rules of Civil Procedure to sequester *any* of the Respondents' assets and place them in a receivership. Pet. App. 4a.

While the appeal was pending, the case continued in the pretrial stage in the district court, and a preliminary injunction was granted by the district court on October 27, 1992, more than one year after Petitioner appealed the district court's provisions for the payment of attorneys' fees by the receiver. Pet. App. 39a-75a. Like the receivership order, the preliminary injunction was granted, in part, based upon a finding of "substantial likelihood that the [Petitioner] will prevail on its constructive trust and equitable lien

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[4] The district court ordered that the attorneys' fees were to be unrestricted after payment because there was no evidence that the assets were traceable to Mitsubishi funds. Pet. App. 11a. On December 9, 1992, the district court suspended payment of Respondents' attorneys' fees from their sequestered assets. Order in *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.* (N.D. Ga. December 9, 1992). Res. App. 1a-8a.

theories." Pet. App. 66a-67a. Although some defendants consented to the entry of the preliminary injunction, Respondents did not. Pet. App. 40a.

In rejecting Petitioner's appeal, the court of appeals' analysis was two-fold. First, the court found that Petitioner had proceeded under a "mistaken and overly rigid view of constructive trusts" under Georgia law. Pet. App. 19a. Upon a thorough review and analysis of the Georgia statutes and case law governing constructive trusts, and upon noting that the allegations in this case arose "in the context of a contractual, commercial relationship," the court of appeals concluded that the Petitioner was "not entitled to the equitable remedy of a constructive trust because it has an adequate remedy at law." Pet. App. 20a-23a.[5]

Second, setting nomenclature aside, the court of appeals recognized that the substance of the relief afforded by the district court gave force to Petitioner's strategy "to tie up all of the [Respondents'] assets while the parties litigate the . . . claims for damages outlined in the complaint," and sought to determine if some other legal basis might support the district court's action. Pet. App. 25a-26a. The unlimited seizure of all of the Respondents' assets was deemed equivalent to a prejudgment writ of attachment, a remedy expressly governed by Rule 64 of the Federal Rules of Civil Procedure. Pet. App. 27a. As no federal statute providing such relief was invoked by Petitioner, Rule 64 permits prejudgment attachment only in accordance with state law. Finding none of the requisites for attachment under Georgia law present, the court of appeals concluded that the district

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[5] Judge Carnes dissented from this ruling, opining that Petitioner would be entitled to a constructive trust under Georgia law. Pet. App. 31a-38a (Carnes, J., concurring in part and dissenting in part).

court's action could not be upheld under Rule 64. Pet. App. 28a-29a.

Notably, Petitioner incorrectly states the court's holding below. The court of appeals did not, as Petitioner asserts, hold that a "general federal rule of equity" prohibits the issuance of a preliminary injunction to prevent the dissipation of assets to protect a money judgment. Pet. 7. Rather, the court of appeals observed that "ordinarily" a court may not freeze a defendant's assets for the purpose of satisfying a potential money judgment. Pet. App. 26a. Having found no basis under either the Georgia law of constructive trusts or Rule 64 to support the district court's receivership order, the court of appeals affirmed the orders on appeal.

On March 2, 1994, Petitioner sought rehearing and suggested rehearing *en banc*. On April 28, 1994, the petition for rehearing was denied. As no member of the panel nor any other judge in regular active service requested that the court be polled on rehearing *en banc*, Petitioner's suggestion for rehearing *en banc* was also denied. Pet. App. 92a. After the court of appeals denied Petitioner's motion to stay the mandate, Justice Kennedy, acting as Circuit Justice, granted Petitioner's application in this Court for a stay of the court of appeals' mandate pending the disposition of the petition for a writ of certiorari. Pet. App. 93a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, is consistent with prior decisions of the Court, does not raise any conflicts among the federal courts of appeals, and resulted from an interlocutory appeal. Further review by the Court is therefore unwarranted.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

Petitioner's assertion that the decision of the court of appeals is inconsistent with the decisions of this Court in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) and *United States v. First National City Bank*, 379 U.S. 378 (1965) is erroneous.

The decision below is compatible with and readily distinguishable from the Court's decision in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). The plaintiffs in *Deckert* sued under the Securities Act of 1933 (the "Securities Act"), seeking equitable relief, primarily in the form of rescission and restitution, and a temporary injunction. Unlike Petitioner, the plaintiffs in *Deckert* stated a cause of action under applicable law entitling them to the equitable relief sought. *Deckert*, 311 U.S. at 288.[6] Furthermore, the power of the district court to grant the relief provided by the Securities Act, including preliminary equitable relief, was founded upon the statutory authority in the district court "*to enforce*" a plaintiff's right to recovery under Section 22(a) of the Securities Act. *Id.* Having found that the plaintiffs were entitled to equitable relief under the Securities Act, the Court held that the temporary injunction, which had been "framed narrowly," was "a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill." *Id.* at 290.

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[6] The Court in *Deckert* recognized that the Securities Act provided a "statutory right" to equitable relief. 311 U.S. at 287-88.

In stark contrast to the plaintiffs in *Deckert*, the Petitioner sought sweeping interim equitable relief in an action the court of appeals concluded was solely for money damages. As the court of appeals posed the issue, it addressed whether the district court erred in allowing the payment of Respondents' attorneys' fees out of the funds sequestered by the receivership order and exempted them from the operation of any state law constructive trust that might be entered after trial. Pet. App. 12a. The interlocutory orders under review were issued not pursuant to any federal statutory authority, but rather, on the presumed likelihood that Petitioner would prevail on its constructive trust claim. *Deckert* neither controls nor guides the decision here. The court of appeals decision is not inconsistent with the Court's decision in *Deckert*.

The decision below also is not inconsistent with *United States v. First National City Bank*, 379 U.S. 378 (1965). As in *Deckert*, the district court's authority in *First National* to grant the temporary injunction was based upon federal statutory authority. *First National*, 379 U.S. at 380. As the Court noted, the district court had express power to grant the injunction sought by the government pursuant to 26 U.S.C. § 7402(a). *Id.* In exercising its authority under the statute to issue a temporary injunction affecting the bank's assets at issue in the case, the district court in *First National* also looked to the significant public interest in preventing foreign taxpayers from evading the jurisdiction of United States courts by either transferring their assets abroad or by dissipating their assets in foreign accounts under control of American institutions. *Id.* Thus, in considering the correctness of the district court's "exercise of the equity power granted by 26 U.S.C. § 7402(a)," the Court found important the public interest involved: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they

are accustomed to go when only private interests are involved." *Id.* at 383 (quoting *Virginian R. Co. v. System Fed'n*, 300 U.S. 515, 552 (1937)).

Conversely, Petitioner can claim neither federal statutory authority nor a strong public policy interest to support the court's seizure of Respondents' assets in this case. Rather, the receivership order was issued by the district court under the mistaken view that the Petitioner was likely entitled to a constructive trust under Georgia law. Pet. App. 66a-67a. In this contractual dispute between textile merchants, no matters of public concern have ever been raised or addressed. Thus, the injunction at issue in *First National*, which had been issued to the government pursuant to the court's authority under federal statute, and which was determined to be an appropriate measure to protect a matter of significant public interest, was granted under circumstances wholly at odds from the case here.

Petitioner also claims error in the court of appeals for its adoption of language from *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945) to support its decision. The court of appeals observed that the unlimited prejudgment seizure of the Respondents' assets, where Petitioner had an adequate remedy at law, would "create a precedent of sweeping effect." Pet. App. 30a. In *De Beers*, the preliminary injunction, which prevented the transfer of assets by the defendants, was granted by the district court to secure a potential money judgment in the event of a future finding of contempt. *De Beers*, 325 U.S. at 220. The Court held the temporary injunction under review was not proper because the relief it afforded was not of the same character,

and could not therefore preserve a remedy, that could be granted finally in the case.[7]

In considering the interlocutory relief granted to Petitioner, the court of appeals shared the concerns voiced by the Court in *De Beers*:

> To sustain the challenged order[s] would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

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[7] In accordance with the Court's teachings in *De Beers*, where the Court noted at the outset that "it will be well to note exactly what is the substance of the injunction, since the name given to the process is not determinative," 325 U.S. at 219, the court below examined the nature of the relief sought by Petitioner, and concluded that it was, in substance, a prejudgment attachment. Pet. App. 27a-29a.

Pet. App. 30a (quoting *De Beers*, 325 U.S. at 222-23). In view of the court of appeals' determination that the Petitioner was not entitled to a constructive trust under Georgia law, and that the Petitioner had not otherwise met the standards for a prejudgment attachment under Rule 64, the court of appeals' deference to the teachings of *De Beers* was not error.

In sum, the decision below is not inconsistent with this Court's prior decisions and further review by the Court is not warranted on that ground.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEALS ON THE ISSUE PRESENTED BY THIS CASE

Petitioner urges a conflict among the federal courts of appeals which simply does not exist. For various reasons, each of which is discussed below, all of the federal courts of appeals' decisions relied upon by Petitioner are distinguishable from the decision below and do not demonstrate a split of authority warranting the Court's review. Indeed, none of these cases supports the broad rule of law urged by Petitioner that a federal district court has authority, either under Rule 65 of the Federal Rules of Civil Procedure, or under the All Writs Act, to sequester and place into a receivership all of a defendant's assets for the sole purpose of satisfying a possible future money judgment.

A. Unlike the Decisions Upon Which It Relies, Petitioner Did Not Meet the Requisites for Equitable Relief

An important factor in the court of appeals' analysis was the absence of irreparable harm and the existence of an adequate remedy at law. Pet. App. 23a-24a. As the Court

has recognized, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959)).

Consistent with the decisions of this Court and with the opinion below, almost all of the other courts of appeals' decisions Petitioner contends are in conflict with the Eleventh Circuit have stressed the necessity of demonstrating irreparable harm prior to the granting of any preliminary equitable relief. *See Hughes Network Sys. v. Interdigital Comm. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) (plaintiff must demonstrate irreparable harm to obtain preliminary injunctive relief); *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994) (plaintiff must demonstrate irreparable harm to obtain preliminary injunctive relief); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988) (where court held "there has been a sufficient showing of irreparable harm to Unisys as well as a balance of harms in favor of Unisys"); *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (plaintiff must demonstrate irreparable harm to obtain preliminary injunctive relief); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) (a showing of irreparable harm is a prerequisite to the granting of preliminary injunctive relief); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (plaintiff must demonstrate both irreparable harm and the absence of an adequate remedy at law prior to obtaining a preliminary injunction; "[t]he absence of an adequate remedy at law is a precondition to any form of equitable relief.").

The decision below is not inconsistent with the principles of equity cited by the other courts of appeals. In reaching for relief in this Court, Petitioner, unfortunately, has

overstated what the court of appeals "held": that which Petitioner refers to as the erroneous "general federal rule of equity" purportedly announced by the court below. But Petitioner has failed to present the court of appeals' statement in its entirety. Pet. 7. In finding no legal basis for the receivership order here, the court of appeals did not speak in absolutes; it merely observed that: "*Ordinarily*, 'the general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.'" Pet. App. 26a (quoting *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988)) (emphasis supplied). This observation is entirely consistent with the other circuits on this issue and does not present the conflict espoused by Petitioner. *See, e.g.*, *Foxboro Co. v. Arabian Am. Oil Co.*, 805 F.2d 34, 36 (1st Cir. 1986) (irreparable injury does not exist "where only money is at stake and where the plaintiff has a satisfactory remedy at law to recover the money at issue.");[8] *Hughes Network Systems*, 17 F.3d at 693-94 (although "extraordinary circumstances" may demonstrate irreparable harm even where money damages are sought, a preliminary injunction will normally not be granted "where the harm suffered may be remedied by money damages at judgment."); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985) ("As a general rule, of course, a party may not obtain injunctive

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[8] Notably, *Foxboro* was decided *after* the First Circuit's decision in *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986), a case relied upon by the Petitioner as evidencing a split of authority among the federal courts of appeals. The court in *Foxboro* vacated the preliminary injunction because the plaintiff had failed to demonstrate irreparable harm. *Foxboro*, 805 F.2d at 35.

relief where it is claiming a loss that can be adequately remedied by an award of money damages.").

The court of appeals simply did not, as Petitioner contends, announce a broad-sweeping general federal rule of equity that a court may never impose restraints upon a defendant's assets *pendente lite* in order to secure those assets to satisfy a possible money judgment. Rather, the court of appeals stated that "ordinarily" a court may not freeze assets for those purposes, and held that, in this case, there was no extraordinary basis for such preliminary equitable relief. Pet. App. 26a.

B. Decisions Upholding Interim Equitable Relief Granted Pursuant to Authority Under Federal Statute are not Comparable to the Decision Below

Several of the cases relied upon by Petitioner as being inconsistent with the decision below are also inapposite as the interlocutory injunctive relief accorded was deemed available pursuant to federal statute.

For example, in *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986), the court reviewed an injunctive decree requiring the liquidating defendant corporation to hold a portion of a fund already set up for creditors' claims to satisfy any award entered in a pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 1-16 (1970 & Supp. 1994) ("FAA"). The court relied upon the announced congressional desire to "enforce" arbitration agreements under the FAA as authority in the district court for entry of the challenged decree. Thus, as in *Deckert*, the court of appeals found the power to "enforce" a remedy under a federal statute to carry the power to enter preliminary

injunctive relief to protect a fund established for the precise purpose of protecting defendant's creditors.

Similarly, in *In re Feit & Drexler, Inc.*, 760 F.2d 406 (2d Cir. 1985), federal statutory authority supported the decree. There, the injunction at issue was granted in accordance with the bankruptcy court's express powers under the Bankruptcy Code, virtually identical to the injunctive provision identified by this Court in *First National*. Also, in *Foltz v. U.S. News & World Report*, 760 F.2d 1300 (D.C. Cir. 1985), a narrowly drawn injunctive decree was deemed within the authority of the district court to avoid "[i]rrevocable loss" of a congressionally created cause of action against a pension plan by plan participants under the Employment Retirement Income Security Act ("ERISA"). 760 F.2d at 1308. The court there noted that it was embracing "an equitable remedy designed to freeze the *status quo*, as opposed to creating a pool of resources from which [plaintiffs] could draw prior to a determination of liability," *id.* at 1309, while the parties sorted out "novel questions in the labyrinthine complexities of ERISA law and practice." *Id.* at 1308.

Again, in *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989), the disputed injunctive decree was obtained *by the government* in an action for equitable relief and damages under the False Claims Act, 31 U.S.C. § 3729, where the enjoined party, the subject of a highly leveraged buyout, was involved in a self-liquidation. The court found the situation "more closely aligned" with that in *Deckert* and *First National* and upheld the district court's action.[9] *Id.* at 1330.

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[9] In a footnote, the court in *Singer* does, we believe, go beyond the limited holdings in *Deckert* and *First National* to (continued...)

And finally, in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984), the court of appeals was faced with the district court's grant of a preliminary injunction enjoining the revocation of a distributorship agreement pursuant to the authority of a federal statute, Section 3 of the Clayton Act, 15 U.S.C. § 14. *Id.* at 381. The court of appeals after discussing, in *dicta*, the requisites for a preliminary injunction, *reversed* the lower court's preliminary injunction as improvident. *Id.* at 395.

Therefore, the decisions of the First, Second, Fourth, Seventh, and District of Columbia Circuit Courts of Appeals relied upon by Petitioner to show a split of authority are not comparable to the court of appeals' decision here and do not stand for the general proposition that a district court may freeze a defendant's assets in order to preserve a fund for payment of a money judgment in the event the plaintiff succeeds on its claims under state law.[10]

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[9](...continued)
find in them "approval of the exercise of general equitable power to protect a plaintiff's right to recovery." *Singer*, 889 F.2d at 1330 n.15.

[10] Other cases relied upon by Petitioner do not aid its position as they involve the issuance of provisional injunctive decrees to preserve specific assets subject to ultimate injunctive relief in the case, not, as the situation here, to preserve a fund from which an inchoate money judgment may be satisfied. In *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987), for example, the district court's authority to issue a preliminary injunction order designed to preserve a stock of fraudulently obtained airline tickets was upheld by the court of appeals as plaintiff's "only true
(continued...)

C. The Interlocutory Equitable Relief in This Case Did Not Involve Matters of Significant Public Interest

As stated by this Court in *First National*, courts "may, and frequently do, go much farther" in granting preliminary injunctive relief where a public interest is at stake. 379 U.S. at 383. In this vein, at least two of the cases relied upon by the Petitioner to show a conflict among the circuits do not aid Petitioner's cause. These cases, rather than embrace the broad equitable doctrine Petitioner espouses, are colored by the overriding public interest in the decision to grant the injunctive relief.

In *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), the plaintiff sought preliminary and permanent injunctive relief to enjoin a transaction among public utilities threatening the viability of the whole REA system of utilities. 805 F.2d at 354, 356. The plaintiff appealed the district court's dissolution of a consensual preliminary injunction. The narrow issue before the court of appeals was whether the lower court abused its discretion in dissolving the provisional relief. *Id.* at 354. A significant part of the equation in the court's analysis was the "broad public interest" favoring the plaintiff's position. *Id.*

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[10](...continued)
recourse is to recover the outstanding [airline] tickets." 825 F.2d at 1226-27. No pronouncement of general federal equity precepts at odds with the decision below was issued by the court in *Airlines Reporting Corp.*; rather, the court found the plaintiff had no adequate remedy at law and that the preliminary injunction was proper "in the circumstances of this case." *Id.* at 1227.

at 358. Indeed, the court concluded that the public interest "favor[ed] issuance of the injunction." *Id.* at 360.

In addition to its reliance upon federal statute as noted above, the court in *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989), also found the public interest in deterring "exploitation of the public fisc" a factor in holding that the district court did not abuse its discretion in granting the preliminary injunction. *Id.* at 1335.

As the decisions of the Tenth Circuit in *Tri-State* and the Fourth Circuit in *Singer* were decided with significant public interests in mind, these cases are readily distinguishable and do not demonstrate a division of authority among the lower federal courts.

D. The Preliminary Injunctions Sustained by Other Courts Have Been Narrowly Tailored To Preserve the Final Remedy

The Petitioner's reliance on *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990) is also misplaced. While the *Hoxworth* court made several sweeping pronouncements with which the court below indicated disagreement, those pronouncements were *dicta* as the *Hoxworth* court *vacated* the preliminary injunction at issue as "fatally overbroad." *Hoxworth*, 903 F.2d at 208, 211. The court in *Hoxworth* emphasized that "just because a district court enjoys the power to protect a potential future damages remedy with a preliminary injunction does not mean that such an injunction is appropriate in a run-of-the-mill damages action." *Id.* at 197. *See also Hughes Network Sys. v. Interdigital Comm. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) ("Where the harm suffered by the moving party may be compensated by an award of money damages at judgment,

courts generally have refused to find that harm irreparable.").

Notably, the overbroad preliminary injunction in *Hoxworth*, which was vacated on appeal, was far narrower than the sweeping interlocutory equitable relief here. In *Hoxworth*, the district court merely prohibited the defendants "from transferring any funds outside the ordinary course of business and from transferring any funds outside the country without prior approval by the district court." *Hoxworth*, 903 F.2d at 189. Likewise, in *Unisys Corp. v. Dataware Products, Inc.*, 848 F.2d 311 (1st Cir. 1988), the preliminary injunction prohibited the defendants "from transferring any assets or stock other than in the ordinary course of business." *Unisys Corp.*, 848 F.2d at 313. As noted by the Fourth Circuit in *Hughes Network Systems*, in those cases where preliminary injunctions have been issued to preserve a potential award for money damages, the preliminary injunctions have been "carefully tailored." 17 F.3d at 694.

In this case, by contrast, the comprehensive receivership order effected attachment of *all* of the Respondents' assets. The restraint on those assets was not limited to transactions outside of the Respondents' ordinary course of business, as in *Hoxworth* and *Unisys Corp.*, but rather, the court stripped the Respondents of *any* control over *any* assets whether inside or outside the ordinary course of business. Pet. App. 80a-89a.

III. THIS CASE DOES NOT PRESENT AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

This case, which involves interlocutory relief in a private commercial dispute between merchants over the sale of textile yarn, presents no important or recurring questions warranting the Court's further review.

In applying the Georgia law invoked by Petitioner, the court of appeals found that the Petitioner was not entitled to the imposition of any constructive trust under the facts of this case. In finding no ultimate equitable remedy available to support interim equitable relief, the court of appeals also stated that "*ordinarily*" a court may not seize a defendant's assets in order to satisfy a potential future money judgment for damages. Pet. App. 26a (emphasis supplied). It is this observation which, although entirely consistent with the prior decisions of this Court, as well as the decisions of the other federal courts of appeals, Petitioner posits is an important question mandating this Court's review. The Petitioner is wrong.

Certiorari is restricted to those "cases involving principles the settlement of which is of importance to the public, *as distinguished from that of the parties.*" *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (on dismissal of writ of certiorari) (emphasis supplied). There are no public concerns at stake in the district court's interlocutory rulings in this private, contractual dispute. In fact, the only interest at stake in this appeal is the payment of Respondents' attorneys' fees. Further review by the Court is not warranted.

Moreover, the question presented by this case, as opposed to the one urged upon the Court by the Petitioner, is not a recurring one. The issue posed by Petitioner below and addressed by the court of appeals -- whether the district court erred by allowing for the payment of Respondents' attorneys' fees out of receivership assets and by exempting those payments from the operation of any constructive trust that might imposed on final judgment -- was not discussed in any of the decisions purported by Petitioner to be in conflict with the Eleventh Circuit. Nor is this the issue now presented by the Petitioner to this Court.

The federal procedural issues also do not merit review by this Court as the court of appeals correctly determined Petitioner could not claim relief under the Federal Rules of Civil Procedure or the All Writs Act.

The court of appeals examined all possible bases to uphold the district court's receivership order, including Federal Rule 64, and found that Petitioner could not meet the standard embodied in the Rule. In footnote 24 to the opinion below, the court of appeals stated that the district court was "not authorized under Rule 65 to attempt to accomplish" what it otherwise could not do under Rule 64 and observed that the Third Circuit in *Hoxworth* disagreed. Pet. App. 27a-28a. The court below made too much of the appearance of a conflict with the Third Circuit on this point, inasmuch as the court in *Hoxworth expressly declined* to decide whether the injunction at issue was in fact a prejudgment attachment. *Hoxworth*, 903 F.2d at 195 n.14.[11] As noted above, Petitioner has elevated this

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[11] Because the parties had not raised the issue, the court in *Hoxworth* found it had "no occasion" to address whether

(continued...)

footnoted point to the crux of its petition. But the court of appeals was correct in concluding that Petitioner may not accomplish under Rule 65 what it otherwise may not lawfully accomplish under Rule 64. To allow Petitioner to do so would render Rule 64 meaningless. In analogous circumstances, this Court has expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Freytag v. C.I.R.*, 501 U.S. 868, __, 111 S.Ct. 2631, 2638 (1991) (quoting *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 562 (1990)).[12] Thus, the Petitioner is simply incorrect in its assertion that an important and recurring question arises from the court of appeals' determination that the prejudgment seizure of Respondents' assets should be allowed under Rule 65 when Petitioner admittedly cannot meet the requirements of Rule 64.

Petitioner's reliance upon the All Writs Act, 28 U.S.C. § 1651 (1988) is also misplaced.

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[11](...continued)
the injunction there was in fact a prejudgment attachment subject to Rule 64. 903 F.2d at 195 n.14.

[12] This reasoning is consistent also with the mandate of Rule 66, which governs receivers appointed by federal courts, that all actions in which a receiver is sought are governed by the Federal Rules.

Moreover, Petitioner's assertion in this Court for the first time that Rule 65 provides "authority" for a prejudgment attachment of assets confronts the serious issue of whether the construction of Rule 65 urged by Petitioner would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides in part that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right."

The court of appeals correctly summarily disposed of any contention that the All Writs Act might supply authority for the granting of the preliminary equitable relief here. Pet. App. 18a-19a. The court, citing *Pennsylvania Bureau of Corrections v. U.S. Marshals Serv.*, 474 U.S. 34 (1985), observed that the All Writs Act provides the district court with "incidental" authority to issue only those writs necessary for preserving subject matter jurisdiction. Pet. App. 18a.

By invoking the All Writs Act as a basis for the preliminary equitable relief provided by the district court below, the Petitioner submits that the All Writs Act authorizes the court to do what it otherwise could not do under the Federal Rules. Preliminary injunctive relief was not available because the Petitioner had no right to a constructive trust and could not show irreparable injury. A prejudgment attachment was not proper under Rule 64 because Petitioner had no basis for such a remedy. As a result, the Petitioner urges that a district court has authority under the All Writs Act to order sequestration of a defendants' assets for the purpose of protecting a possible money judgment.

This Court has held that the All Writs Act may not be distorted to such purposes:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with

statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Corrections, 474 U.S. at 43. There simply is no support for Petitioner's assertion that it may effect an otherwise unavailable prejudgment attachment of Respondents' assets pursuant to the All Writs Act.

Thus, the decision below does not present a recurring question meriting the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1994

APPENDIX

[Filed Dec. 9, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:91-CV-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,

Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., et al.,

Defendants.

ORDER

This matter is before the Court on a number of motions, most of which involve discovery disputes between the parties.

This matter has produced nearly one thousand pleadings and has imposed an unusual burden on the Court's resources.

To promote the efficient resolution of this matter, the Court will no longer grant extensions of time in this action, even by consent of the parties, and will grant no further hearings or conferences. Likewise, the Court will entertain no motions filed after February 1, 1993. As of January 1, 1993, the Court will no longer permit the payment of attorneys' fees from the funds held in receivership in this action and directs the Receiver accordingly; the issue of attorneys' fees will be resolved after trial. The trial date for this case, originally set for January 25, 1993, has been rescheduled for April 5, 1993, because of the Court's heavy criminal docket.

Furthermore, counsel for the parties in this matter have been unreasonably inclined to dispute discovery issues. While trial courts have broad discretion to control discovery, they also have a duty, especially in complex cases, to limit discovery to protect parties and witnesses from annoyance and excessive expense. National Independent Theatre Exhibitors, Inc. v. Buena Vista Distributing Co., 748 F.2d 602, 609 (11th Cir. 1984), cert. denied, 471 U.S. 1056 (1985); Doglow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971). Further, attorneys have an affirmative duty to conduct pretrial discovery in a responsible manner that is consistent with the spirit of the federal discovery rules and may be sanctioned for their failure to do so. See Fed. R. Civ. P. 26(g), 37; N.D. Ga. R. 225-4. Toward these ends, the Court directs the parties to complete all discovery by January 15, 1993, including discovery outside the Court's supervision. The Court reminds counsel of their duty under Rule 26(g), of the possibility of sanctions, and of the Court's reluctance to involve itself in discovery disputes between counsel.

The Court now summarizes its rulings on the motions before it:

1. For the reasons well stated in plaintiff's motion and reply brief, the Court GRANTS plaintiff's motion to submit additional interrogatories to defendant General Sales & Leasing Co. ("General Sales") [#623-1]. The interrogatories seek facts relevant to this action and are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

2. The Court DENIES plaintiff's motion for protective order to prevent the deposition of Mr. Kondo [#746-1] by defendant ConAgra, Inc. ("ConAgra"). See Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979). The Court, however, directs ConAgra to pay Mr. Kondo's personal expenses incurred in taking his deposition. American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 448 (W.D. Mo. 1976).

3. The Court DENIES plaintiff's motion for protective order to prevent the deposition of Mr. Koyama [#745-1] by ConAgra. See Salter, 593 F.2d at 651. The Court, however, directs ConAgra to pay Mr. Koyama's personal expenses incurred in taking his deposition. American Standard, 71 F.R.D. at 448.

4. The Court GRANTS plaintiff's motion for protective order to prevent the deposition of Mr. Saito [#756-1] by ConAgra. Mr. Saito is a nontestifying expert, and ConAgra has not shown exceptional circumstances warranting his deposition. Fed. R. Civ. P. 24(b)(4)(B); see In re Shell Oil Refinery, 132 F.R.D. 437, 442 (E.D. La. 1990); see also 8 Wright & Miller, Federal Practice & Procedure § 2032, at 256.

5. To avoid the necessity of future repetitive litigation, and because none of the parties will be prejudiced, the Court GRANTS plaintiff's motion to amend its

complaint [#802-1]. See Scott v. Crescent Tool Co., 306 F. Supp. 884, 887 (N.D. Ga. 1969).

6. For the reasons well stated in plaintiff's motion and reply brief, the Court GRANTS plaintiff's motion to compel responses to discovery served on ConAgra [#814-1]. The documents sought are relevant to this action and reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1), 37(a).

7. The Court GRANTS plaintiff's motion for a protective order to prevent the fifth deposition of Mr. Noma [#827-1] by ConAgra. ConAgra has obtained a significant amount of discovery as to Mr. Noma and has not shown how further discovery would be helpful. See Avirgan v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991), cert. denied, 112 S. Ct. 913 (1992).

8. After an in camera inspection of the documents withheld from ConAgra by the Federal Bureau of Investigation ("FBI") and for the reasons stated in the Government's motion and response, the Court GRANTS IN PART and DENIES IN PART the FBI's motion to quash subpoenas served by ConAgra or alternatively for a protective order [#652-1]. The Court directs the FBI to produce the documents it has produced for plaintiff, those produced by plaintiff, and the documents seized from Ms. Mary Ellen Lee, but grants the FBI's motion for a protective order as to all other documents. See In re Application of Eisenberg, 654 F.2d 1107, 1113 (5th Cir. Unit B Sept. 1981); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1962).

9. The Court DENIES ConAgra's motion to compel plaintiff to answer interrogatories [#730-1]. The Court finds that plaintiff has satisfactorily answered the interrogatories at issue and that plaintiff has satisfied its burden of production under Rule 33(c). Fed. R. Civ. P. 33(c), 37(a); see Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 44 (S.D.N.Y. 1985).

10. The Court DENIES ConAgra's motion to compel plaintiff to produce documents (filed August 25, 1992) [#786-1]. The Court finds that the discovery sought is unreasonably cumulative and that ConAgra has had ample opportunity to discover the information sought. Fed. R. Civ. P. 26(b)(1).

11. The Court DENIES ConAgra's motion to compel the deposition testimony of James Brumm [#834-1] on the grounds of attorney-client and work product privileges. Fed. R. Civ. P. 26(b)(3); see Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8th Cir. 1986); In re Federal Grand Jury Proceedings, 938 F.2d 1578, 1582 (11th Cir. 1991). While the attorney-client privilege does not protect underlying facts from discovery, it does protect communications between attorney and client. Id.

12. The Court DENIES ConAgra's motion to compel plaintiff to produce documents (filed October 6, 1992) [#861-1]. The Court concludes that the documents sought by Request No. 14 are protected by the attorney-client and work product privileges and that, as to those documents protected by the work product privilege, ConAgra has not shown that it cannot obtain the substantial equivalent of these materials by other means. Fed. R. Civ. P. 26(b)(3). The Court also

concludes that Request No. 15 is overly broad and that ConAgra has not justified why the last ten years of purchase orders relating to any product in any of plaintiff's divisions would be relevant to this action, especially when plaintiff has already produced voluminous documents. Fed. R. Civ. P. 26(b)(1).

13. The Court DENIES AS MOOT ConAgra's motion for an extension of time within which to respond to plaintiff's motion to compel responses to discovery.

14. The Court DENIES the motion of defendants Cardinal Textile Sales, Inc., United General Marketing, Inc., and Charles W. Jones individually and d/b/a Consolidated Trading Co. to compel a response to a deposition question [#833-1]. The Court concludes that the information sought concerns communications between an in-house attorney and his corporate clients, that these communications are protected by the attorney-client privilege, and that corporations can invoke the privilege. Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981); Moore v. Tri-City Hospital Authority, 118 F.R.D. 646, 648-49 (N.D. Ga. 1988).

15. The Court GRANTS plaintiff's second motion to submit additional interrogatories to General Sales [#865-1]. The interrogatories seek relevant facts and are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

16. The Court GRANTS plaintiff's motion to determine the sufficiency of answers to plaintiff's second request for admissions [#866-1]. The Court finds General Sales' answers to be insufficient and directs General Sales to respond fully within ten days of the date of this order or the matters at issue will be deemed admitted and

General Sales will be charged with plaintiff's reasonable attorneys' fees incurred in proving these matters. Fed. R. Civ. P. 37(c).

17. The Court GRANTS plaintiff's motion to compel responses to discovery served on ConAgra [#876-1]. The documents requested are relevant to this action and reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

18. After consideration of the motions, responses, and replies of the Receiver, Fidelity Savings Bank ("Fidelity"), and the parties, the Court GRANTS the Receiver's motion to compel Fidelity to pay certain funds held on behalf of Robert E. Lee into the registry of the Court [#557-1]. The Court's Receivership Order stated that

> all creditors and other persons seeking money damages or other relief from any Receiver Entities . . . are hereby stayed and restrained from doing anything to interfere with the possession, recovery, or management by the Receiver of the property and assets owned, controlled, belonging to, or in the possession of any of the Receiver Entities or to interfere with the Receiver in any manner during the pendency of this proceeding.

Receivership Order of August 22, 1991, at 7. The funds at issue here must be protected to preserve the status quo, and placing them in the Court's registry does not decide the merits of various creditors' claims. See United States v. Arizona Fuels Corp., 739 F.2d 455 (9th Cir. 1984). Thus, the Court directs Fidelity

to pay into the registry the funds it holds as security for a letter of credit on behalf of defendant Robert E. Lee.

19. The Court GRANTS plaintiff's unopposed motion to determine the sufficiency of answers of the defendants Purvis-Sikkelee International, Ltd., Skein Dyers of America, Inc., William J. Purvis, and William L. Sikkelee ("PSI Group") to plaintiff's requests for admissions [#913-1]. The Court finds the PSI Group's answers insufficient and directs the PSI Group to truthfully admit or specifically deny each request within ten days of the date of this order or the matters at issue will be deemed admitted and the PSI Group will be charged with plaintiff's reasonable attorneys' fees incurred in proving these matters. Fed. R. Civ. P. 36, 37.

20. The Court GRANTS plaintiff's unopposed motion to submit two additional interrogatories to the PSI Group [#912-1]. The interrogatories seek facts relevant to this action and are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

IT IS SO ORDERED, this 9th day of December, 1992.

/s/ Marvin H. Shoob
United States District Court
Northern District of Georgia

[Filed Aug. 28, 1991]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:91-CV-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,

Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., GENERAL SALES & LEASING CO., UNITED GENERAL MARKETING, INC., CLASSIC SALES, CONSOLIDATED TRADING CO., FIBERTEX TEXTILE SUPPLIES, INC., PURVIS-SIKKELEE INTERNATIONAL LTD., SKEIN DYERS OF AMERICA, INC., SUN-FIBRES, INC., RAYMOND B. LIPPINCOTT, III, MARY ELLEN LEE, CHARLES W. JONES, ROBERT E. LEE, WILLIAM J. PURVIS, WILLIAM L. SIKKELEE AND JOSEPH L. SMITH,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Mitsubishi International Corporation ("MIC") hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the pretrial Order of the Court dated August 22, 1991. MIC appeals from the portion of the Order which (i) authorizes payment of attorneys' fees to counsel for certain defendants, (ii) releases funds paid to these attorneys from "any restraint or constructive trust," and (iii) forbids MIC from seeking disgorgement, repayment, or a refund of those released funds at any time.

This 28th day of August, 1991.

Respectfully submitted,

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